A CRITICAL SURVEY OF CERTAIN PHASES OF TRIAL PROCEDURE IN CRIMINAL CASES.*

VI. SWEARING THE JURY.

At common law the oath administered to petit jurors in felony cases was as follows:

> "You shall well and truly try and true deliverance make between our sovereign lord the King, and the prisoner at the bar, whom you shall have in charge, and true verdict give according to the evidence, so help you God."

In misdemeanors the form was slightly different:

> "You shall well and truly try the issue joined between our sovereign lord the King and the defendant and true verdict give according to the evidence, so help you God."

In this country there are statutes in many of the States prescribing the form of oath that is to be administered; in others, the common law forms have been adhered to in the absence of legislative enactment. In a few States a more formal oath is required in capital than in non-capital cases, the two forms being practically equivalent to the common law oaths noted above.[139] But most of the States have provided by statute that a single form of oath designated shall apply to all criminal cases. These vary in length and solemnity from that of Connecticut:

> "You do solemnly swear by the name of the ever-living God, that without respect of persons or favor of any man, you will well and truly try and true deliverance make between the State of Connecticut and the prisoner at the bar whom you shall have in charge, according to the law and the evidence before you; so help you God."[140]

to the comparatively simple statute in Wisconsin:

> "You shall well and truly try the issue between the state of Wisconsin and the defendant according to the evidence, so help you God."[141]

---

*Continued from the May issue, 63 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 638.

[139] Florida, General Statutes, 1906, §3995; Massachusetts, Revised Laws, 1902, p. 188, §4; Washington, Codes and Statutes, 1910, §2143.

[140] General Statutes, 1902, §4795.

[141] Statutes, 1911, §4691.

It is usually provided that any juror who is conscientiously scrupulous of taking the oath prescribed shall be allowed to make affirmation, substituting the words "this you do under the pains and penalties of perjury" for "so help you God."

Under our judicial system, the administration of an oath to the jury is considered an essential feature of "trial by jury." A failure to swear the jury is fatal to a conviction and necessitates a reversal of the case.[142] While there is little authority upon the subject, it is usually said that swearing the jurors for the term is insufficient in criminal prosecutions; they must be sworn to try the particular case. The reasons are given in *Barney* v. *People*:[143]

> "With some jurors and in some cases too much solemnity cannot be observed in the conduct of the trial. The solemnity of calling the juror before the prisoner, in the presence of the court and his there taking the solemn oath prescribed by the law, to well and truly try and true deliverance make of that prisoner, not only gives the prisoner a comfortable assurance that he is to have a fair and impartial trial, but has a salutary tendency to prepare the mind of the juror for the solemn duty he is assuming. We think the jury should be sworn in each case."

It is usually held that the oath must be administered in the statutory language; but by statute in Arkansas it is sufficient if the jury be sworn substantially as provided by law,[144] and there is authority, in the absence of an express statute, to the effect that a substantial compliance with the statute is all that is required.[145] This is certainly the more sensible rule.

It has been said in many cases, though usually by way of *dictum,* that if the record show merely that the jury were "sworn" or "duly sworn" or "sworn according to law," it will be presumed that the oath was properly administered.[146] Where

---

[142] Stevens v. State, 25 S. W. Rep. 286 (Tex. 1894); Slaughter v. State, 100 Ga. 323 (1897).

[143] 22 Ill. 160.

[144] Arkansas, Digest of Statutes, §2373.

[145] Young v. Commonwealth, 19 Ky. L. Rep. 929 (1897); Lancaster v. State, 91 Tenn. 267 (1891).

[146] Lawrence v. Commonwealth, 30 Grat. 845 (Va. 1878); Baldwin v. Kansas, 129 U. S. 52 (1889); Holland v. State, 14 Tex. Ap. 182 (1883); State v. Ice, 34 W. Va. 244 (1890).

the record says more, as that the jury were "sworn to try the issue joined between the parties," but does not quote the required oath *verbatim,* there is a difference of opinion as to whether the oath will be presumed to have been regularly administered. It is held on one hand that such an incomplete recital is to be regarded merely as a statement that the jury were sworn according to law, and it will therefore be presumed that the proper oath was administered.[147] In *Garner* v. *State,*[148] a capital case, the record recital was that the jurors "were duly selected, chosen, empaneled, and sworn to try the issues joined." The following oath was provided by statute:

> "You shall well and truly try and true deliverance make, between the State of Florida and the prisoner at the bar, whom you shall have in charge, so help you God."

It was held:

> "The record entry is not intended to show how the jurors were sworn, but merely to show that they were actually sworn, and the presumption is that the swearing was legally done, unless the record shows the contrary and overcomes the presumption."

The other view is that such a recital is to be regarded as an attempt to declare the oath actually administered; under this view, since the record does not recite the statutory oath exactly, it is presumed that the oath was not properly administered and a reversal follows.[149] This was the result in *Johnson* v. *State,*[150] where the record stated that the jury "were duly sworn to well and truly try the issue joined between the State of Alabama and the defendant, Joe Johnson." It was held:

> "If it were stated that the jury were duly sworn according to law, it might perhaps be presumed that they were sworn in the form required by the statute. The oath stated leaves out an essential part of the oath: 'and a true verdict render accord-

---

[147] Baldwin v. Kansas, 129 U. S. 52 (1889); Brown v. Commonwealth, 86 Va. 466 (1890); Boose v. State, 10 Ohio St. 467 (1855); State v. Ice, 34 W. Va. 244 (1890).

[148] 28 Fla. 113 (1891).

[149] Patterson v. State, 7 Ark. 59 (1846); Tompkin v. State, 4 Tex. Ap. 159 (1878); Schamberger v. State, 68 Ala. 543 (1881).

[150] 47 Ala. 9 (1872).

ing to the evidence, so help you God.' Not only an essential, but the most impressive part of the oath was omitted and the judgment must be reversed."

Again, while it was said in *dictum* in *Harriman* v. *State*,[151] that if the record were wholly silent as to whether an oath had been administered to the jury it would be presumed that they had taken the legal oath, the cases are mostly to the opposite effect. It is rather generally held that a conviction will be reversed where the record does not affirmatively show that the jury were sworn.[152]

It is submitted that there might well be legislation upon this subject, and that a suitable statute might possess the following characteristics: a simple form of oath is desirable, applicable to all criminal cases—that prescribed in Wisconsin, and quoted above, is perhaps as good as any that might be framed; it should be provided that the administration of the oath would be sufficient if substantially in the statutory form, though not exactly in the form prescribed; and there should be a presumption that the oath was properly administered unless the contrary appear of record. Under such a statute, a record wholly silent as to whether or not the jury were sworn, or one containing an incomplete recital of the oath would have the benefit of the presumption and would be held sufficient.

VII. View by the Jury.

At early common law a view by the jury was not permitted in criminal cases; later it was allowed with the consent of both parties, but not otherwise. In England at the present time it appears that the granting of a view is in the discretion of the trial court and does not depend upon consent. In this country, most of the States provide by statute for a view in criminal trials. These statutes vary widely in length and detail. The

[151] 2 Greene, 270 (Ia. 1849).

[152] Nels v. State, 2 Tex. 280 (1848); State v. Phillips, 28 La. An. 387; State v. Randolph, 139 Mo. Ap. 311 (1909); Barbour v. State, 37 Ark. 61 (1881).

Florida statute[153] provides simply that "the court may order a view by the jury," giving no details as to the procedure. The Rhode Island statute[154] also omits details and provides that "the court shall regulate the proceedings and in its discretion accompany the jury." In Indiana[155] the consent of both parties is necessary. Montana[156] requires the presence of the defendant and his counsel. In Kentucky[157] the judge, prisoner and counsel for each side must accompany the jury. In West Virginia[158] in felony cases, judge, clerk and defendant are required to go with the jury. The Mississippi act[159] is the most elaborate of all; by its provisions, the "whole organized court, consisting of the judge, jury, clerk, sheriff, and the necessary number of deputy sheriffs" proceed to the view; the accused must be present; the court for all purposes remains in session during the absence from the courtroom.

The usual statutory provision on this subject, however, is exactly like, or very similar to Section 1119 of the California Penal Code:

> "When in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of the sheriff, to the place, which must be shown to them by a person appointed by the court for that purpose; and the sheriff must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself, on any subject connected with the trial, and to return them into court without unnecessary delay or at a specified time."

The typical American statute provides merely for a view of the "place" in which the offense is charged to have been committed or some material fact occurred; a view of persons or of

[153] Gen. Stats. 1906, §3989. Similiarly, Minnesota, Revised Laws, 1905, §5362; Washington, Code, 1910, §2160; Wisconsin, Statutes, 1911, §4694; Maine, Revised Statutes, 1903, §971.

[154] Statutes, p. 1026.

[155] Annotated Statutes, 1908, §2140.

[156] Revised Statutes, 1906, Vol. III, §958.

[157] Criminal Code of Practice, §236.

[158] Code, 1906, §3730.

[159] Code, 1906, §2720.

personal property is not specifically contemplated. Under the very general language of the Florida statute quoted *supra*, it has been held that a view of personal property is proper,[160] but under most of the statutes upon this subject providing simply for a view of the place, it is usually held that a view of personalty is improper. In *People* v. *Fagan*,[161] during a trial for larceny of cattle, the jury were permitted to view three head of cattle at the corral of one Young, for the purpose of comparing the marks of those cattle with the marks upon a hide that was offered in evidence. The court held the proceeding improper, as the statute only authorized views of places. In Canada[162] the court "may, if it appears expedient for the ends of justice . . . direct that the jury shall have a view of any place, thing or person." The advisability of a statute of this sort suggests itself, in view of the fact that a view of personal property, or even of a person, that cannot easily be brought into court, may often help the jury to a better understanding of the case.

While it is usual to administer an oath to the officer who has been directed to conduct the jury to the place to be viewed, not to communicate with the jury or to suffer other persons to do so, and to return the jury into court promptly, it is held, in New York, that a failure to administer this oath, where the jury are placed in charge of a sworn officer of the court, is an irregularity merely, and that it does not require or justify a new trial, unless there is some opportunity to conclude that the defendant was prejudiced.[163]

It is believed to be the rule everywhere that the granting of a view is a matter entirely within the discretion of the trial court. This is as it should be; if, therefore, a view be asked by either party and refused, this refusal will not be reviewed by the appellate court, unless, perhaps, there has been an obvious abuse of discretion.[164]

---

[160] O'Berry v. State, 47 Fla. 75 (1904).

[161] 33 Pac. 846 (Cal. 1893). *Accord:* State v. Landry, 29 Mont. 218 (1903).

[162] Revised Statutes, 1906, Vol. III, §958.

[163] People v. Johnson, 46 Hun, 669 (N. Y. 1887).

[164] State v. Hunter, 18 Wash. 671 (1898); People v. White, 116 Cal. 17 (1897); People v. Buddensieck, 103 N. Y. 487 (1886); Commonwealth v.

It is error to grant a view of the place where the offence is charged to have been committed, when there has been a material change in its condition, unless the place can be and is in fact restored to its former condition for the purpose of the view. In *State* v. *Knapp*[165] the defendant moved for a view of the premises, which was granted by the court. It was claimed afterward that the condition of the premises had been changed by replacing the top board of a fence which was off when the offense was committed. The effect of the change was that while at the time to which their testimony related, witnesses could distinctly see a man at the door of the house, yet by replacing the board in question the view of that door was wholly obstructed, and thereby the jury were misled, and induced to discredit entirely the testimony of these witnesses upon a point material to the defense. The court granted a new trial because of the probability of injury to the accused.

The view must be properly conducted; the court should see to it that the jury are kept together on their way to, on their return from, and in their view of the premises, under the supervision of an officer, so that no person may communicate with them or express any opinion or give any directions in their hearing, and so that the jurors themselves can be guilty of no misconduct likely to be prejudicial to the defendant.[166] But if there are irregularities at the view, the party desiring to object thereto must do so promptly; if he does not do so at the time, nor upon the return of the jury into court, he is taken to have waived his right of objection, and he may not for the first time suggest the irregularities in the appellate court.[167]

The courts do not agree as to whether the view is to be regarded as part of the trial; some hold that it is part of the trial, as the jury during the view are receiving evidence; they receive evidence, it is said, through the sense of sight, from the mute,

---

Miller, 139 Pa. 77 (1890); Commonwealth v. Chance, 174 Mass. 245 (1899); Young v. Commonwealth, 141 Ky. 708 (1911).

[165] 45 N. H. 148, 157 (1863).

[166] People v. Hull, 86 Mich. 449 (1891).

[167] People v. Fitzgerald, 137 Cal. 546 (1902); Jones v. State, 51 Ohio St. 331 (1894).

inanimate objects which come under their observation, and as the defendant has a right to be confronted with the witnesses against him, he has a right to be present at the view.[168] It is submitted that the more logical attitude is that the view is not part of the trial. It is had away from the courtroom during a temporary adjournment of the court for the purpose. The judge and other officers of the court in most States do not attend. The testimony of witnesses is not received; receiving impressions from visible objects should be regarded not as the reception of evidence, but as a means of enabling the jury to understand and apply the evidence placed before them in open court. Some courts have agreed that the view is not part of the trial.[169] In Ohio the courts have refused to decide whether the view is or is not a part of the trial, but have held very slight conduct on the part of the accused a waiver of the right, if there be such right, to be present at the view.[170]

Whether the view be regarded as part of the trial or not, it is believed that there are no jurisdictions in which it has been said, in the absence of a statute requiring his presence[171] that the defendant may not waive whatever right he has to be present. An express waiver of the right is of course effective.[172] But the accused may also waive the right by voluntary absence, by refusing to attend the view (really a voluntary absence), or by failing to request that he be permitted to be present. In *People* v. *Matthews*[173] the defendant left the courtroom with the jury, who were proceeding to view the premises, and went with

---

[168] State v. Bertin, 24 La. An. 46 (1872); Carroll v. State, 5 Neb. 31 (1876); People v. Jones, 11 Pac. Rep. 501 (Cal. 1886); People v. Bush, 68 Cal. 623 (1886); Foster v. State, 70 Miss. 755 (1893).

[169] People v. Bonney, 19 Cal. 427 (1861), (Reversed by later California cases, see *infra,* note 180); People v. Thorn, 156 N. Y. 286 (1898); State v. Lee Doon, 7 Wash. 308 (1893); State v. Mortenson, 26 Utah, 312 (1903). And see Shular v. State, 105 Ind. 289 (1885).

[170] Reighard v. State, 22 Ohio Cir. Ct. 340 (1901); Blythe v. State, 47 Ohio St. 234 (1890).

[171] Such statutes are found in Montana, Revised Codes, 1907, §9298; Kentucky, Crim. Code Practice, §236; West Virginia, Code, 1906, §3730; Mississippi, Code, 1906, §2720.

[172] State v. Sasse, 72 Wis. 3 (1888); People v. Thorn, 156 N. Y. 286 (1898).

[173] 139 Cal. 527 (1903). *Accord:* State v. Mortenson, 26 Utah, 312 (1903).

them to the foot of the stairs, but gave as his reason for not going farther that he knew the premises very well. It was held:

> "It would be a dangerous rule to hold that the mere absence of the defendant of his own accord during the examination of the premises by the jury would be ground for a new trial. Such a rule would offer an opportunity to a defendant out on bail in every case by some contrivance to absent himself for a few moments, and after a verdict against him for the first time to have such fact presented as a ground for a new trial."

In *Blythe* v. *State*[174] the court gave the defendant permission to accompany the jury at the view, if he desired to do so, but he, by the advice of counsel, declined to go with them. It was held:

> "As the court expressly granted to the defendant permission to accompany the jury when the view was taken, which privilege, under advice of counsel he declined to accept, he must be deemed to have voluntarily absented himself, and thereby waived his right and privilege to be present when the view was taken."

In *State* v. *Reed*,[175] on request of the defendant, a view was had of the premises, without any desire expressed on his part to be present at such view; the court held that it was incumbent upon him to make known his desire to be present, and by his failure to do so, he must be taken to have waived any right, constitutional or otherwise, he might have to be present. In Oklahoma the curious view has been taken, that the defendant by requesting a view thereby expressly waives his right to be present.[176]

There is a difference of opinion as to the effect of an involuntary absence of the defendant from the view, depending, it seems, upon whether or not the view be regarded as part of the trial. In *State* v. *Bertin*[177] the accused was refused permission to attend a view by the jury; the court held this error on the ground that the view was part of the trial, and if had in the ab-

---

[174] 47 Ohio St. 234 (1898). *Accord:* State v. Congdon, 14 R. I. 458 (1884); State v. Buzzell, 59 N. H. 65 (1879).

[175] 3 Idaho, 754 (1894). *Accord:* Shular v. State, 105 Ind. 289 (1885); Reighard v. State, 22 Ohio Cir. Ct. 340 (1901); State v. Hartley, 22 Nev. 342 (1895); State v. Adams, 20 Kan. 312 (1878).

[176] 5 Okla. Cr. 440 (1911).

[177] 24 La. An. 46 (1872).

sence of the defendant, the latter was being deprived of his constitutional right of confrontation. On the other hand, in *Commonwealth* v. *Van Horn*[178] the court declared themselves unable to see in what manner the mere absence of the defendant at the view worked a deprivation of any constitutional right, considering that no testimony was or could be taken during the view. We have suggested that it is more logical to regard the view as not being part of the trial; under this conception, an absence of the defendant from the view, whether voluntary or involuntary, should not be error, unless there be a statute expressly requiring his presence.

In a few States it is provided by law that the judge shall be present at the view;[179] in the absence of an express statutory requirement, whether or not the judge must be present would seem to depend upon whether the view be regarded as part of the trial. So in California, though the statute does not require the presence of the judge at the view, it has been held that he must attend.[180] In jurisdictions where the view is not regarded as part of the trial, the absence of the judge therefrom is not error.[181] In the interest of the prompt administration of justice, the judge should not be required to abandon his other duties, even temporarily, to be present at a view by the jury.

The reception of evidence at the view depends upon the same considerations. If the view be regarded as part of the trial, and judge and defendant are required to be present, evidence may also be received.[182] In this connection the Mississippi statute,[183] the substance of which we have already noted, provides:

> "The court on such occasion shall remain in session from the time it leaves the courtroom till it returns thereto, and while

[178] 188 Pa. 143 (1898).

[179] Kentucky, Code of Practice, §236; Mississippi, Code, 1906, §2720; West Virginia Code, 1906, §3730.

[180] People v. Yut Ling, 74 Cal. 469 (1888).

[181] State v. Adams, 20 Kan. 312 (1878); Shular v. State, 105 Ind. 289 (1885).

[182] People v. Milner, 122 Cal. 171 (1898); Foster v. State, 70 Miss. 755 (1893).

[183] Code, 1906, §2720.

> so in session outside the courtroom, it shall have full power to compel the attendance of witnesses, to preserve order, to prevent disturbance, and to punish for contempt, such as it has when sitting in the courtroom. In criminal trials all such views or inspections must be had before the whole court and in the presence of the accused, and the production of all evidence from all witnesses or objects, animate or inanimate, must be in his presence."

But there are numerous authorities to the effect that testimony may not be taken at the view.[184] In *Hays* v. *Territory*[185] the court sent the jury to view the place where the homicide was alleged to have occurred, compelling the defendant to accompany the jury, the judge and counsel for both sides, to the place. While the jury viewed the premises, a witness gave testimony as to the location of certain objects and the position of certain persons at the time of the homicide. The court held:

> "By our statutes, no person can communicate with the jury on any subject connected with the trial, while they are absent from the courtroom, and a new trial may be had when the jury has received any evidence out of court other than that resulting from a view of the premises. In this case evidence was received out of court. It is true the court and all of the court officers, attorneys for both parties, and the defendant, were all present; but we do not think that a session of the court can be legally held in a country place, or on a public street. The object and purpose of permitting a jury to view the premises is to enable them to better understand the evidence given upon the trial; and in no case, so far as we have been able to learn, has it ever been held that the court can take testimony before the jury while they are viewing the premises."

Foster v. State[186] *had* been decided before this case. Under our theory that the view should not be regarded as part of the trial, witnesses should not be permitted to testify while the jury are thus absent from the courtroom for the purpose of viewing the scene of the crime.

No serious question has arisen in this country as to the granting of a view in another county from that of trial. In

---

[184] Garcia v. State, 34 Fla. 311 (1894); State v. Miller, 61 Wash. 125 (1910); State v. Lopez, 15 Nev. 407 (1880).

[185] 7 Okla. 15 (1898).

[186] *Supra*, note 182.

England, it seems that a view may only be had in the county in which the case is being tried,[187] but the rule here generally appears to be that the court may grant a view in any county of the State. In *Jones* v. *State*[188] the court said:

> "The act does not limit the power to order a view to places within the county; the words are broad enough to authorize a jury to be sent anywhere, and no reason is apparent why a jury might not be sent to any place where a material fact occurred, if within the jurisdiction of the State."

As might be expected, there is a difference of opinion as to whether, if the record do not show in detail the manner of conducting the view, the regularity of the proceedings will be presumed in the appellate court.[189] The better rule is that it will be presumed, in the absence of a showing to the contrary, that the proceedings were regularly conducted.

VIII. Jurors Taking Notes During the Trial.

In the codes of a number of States, in sections concerning the papers that a jury may take with them on retiring to consider their verdict,[190] it is provided that the jurors may take to the jury-room notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person.[191] In general, however, and in the absence of special statutory permission, the taking of notes has been frowned upon. In *Cheek* v. *State*[192] some of the reasons for this position are given: the court said that the taking of notes "was well calculated to divert the attention of the jurors while they were busy, pencil or pen in hand, from the evidence, as it would naturally be progressing while such notes were being made. The

---

[187] Laws of England, Earl of H., Vol. 9, p. 369; Archbald, Criminal Evidence, Pleading and Practice, 24th Edition, p. 224.

[188] 51 Ohio St. 331 (1894). *Accord:* People v. Bush, 71 Cal. 602 (1887).

[189] *Cf.* Benton v. State, 30 Ark. 328 (1875), with People v. Hug, 72 Cal. 117 (1887).

[190] See page 768 of this article.

[191] See for example: N. Y. Code Cr. Pro., §426; Cal. Penal Code, §1137; Minnesota, Laws, 1905, §5367; Arizona, Crim. Code, 960.

[192] 35 Ind. 492 (1871).

juror is to register the evidence, as it is given, on the tablets of his memory and not otherwise. Then the faculty of the memory is made, so far as the jury are concerned, the sole depository of all the evidence that may be given, unless a different course be consented to by the parties or the court. The jury should not be allowed to take the evidence with them to their room except in their memory. Jurors would be too apt to rely on what might be imperfectly written, and thus make the case turn on a part only of the evidence." Again, in *United States* v. *Davis,*[193] it is said:

> "It gives the juror taking notes an undue influence in discussing the case, when he appeals to his notes to settle conflicts of memory. Without corrupt purpose, his notes may be inaccurate or meager or careless and loosely deficient, partial and altogether incomplete. With a corrupt purpose they may be false in fact, and entered for the purpose of misleading or deceiving his fellows, when he comes to appeal to them. There is no protection against such dangers except to forego the practice."

But while the taking of notes by a juror may not be approved, obviously not every indiscretion of this sort should be ground for a new trial. So it has been held that where the defendant does not object to the juror taking notes, a new trial will be refused, as it is presumed to have been with his consent,[194] that a verdict will not be set aside unless defendant did not know of the taking of notes;[195] that it must appear that defendant's attorneys, as well as the defendant, did not know of it, the defendant being bound by the knowledge and by the acts of his attorneys.[196]

It is believed that the jurors should be forbidden by statute to take notes without the permission of the court and that the granting or refusing of such permission should be in the discretion of the court; so the court should be able to suppress the tak-

---

[193] 103 Fed. Rep. 457 (1900).
[194] Clark v. State, 40 Ind. 263 (1872).
[195] State v. Robinson, 117 Mo. 649 (1893).
[196] Long v. State, 94 Ind. 481 (1884).

ing of notes where that is deemed advisable,[197] or to permit notes to be taken, as in case of amounts testified to by a witness.[198] If a juror does in fact take notes without permission, whether or not a new trial is to be granted should depend, not upon whether the defendant objected, or whether he or his attorneys did or did not know that notes were being taken, but upon whether the defendant was prejudiced thereby. It has been held that while the taking of notes is misconduct, if the defendant be not shown to have been prejudiced, a new trial will be refused. So in *State* v. *Joseph*,[199] one of the jurors made a memorandum of the testimony of some of the witnesses and carried the same into the jury-room with him. The juror testified that there were but three or four lines on the back of an envelope; that he saw defendant's counsel looking at him while he wrote; another juror told him he had better quit writing; he did so, and put the envelope in his pocket; he did not show the notes to the rest of the jurors, and there being so little as to benefit himself not at all, he tore it up. The court refused a new trial, holding:

> "It is impossible to conceive of any injury resulting from so slight an indiscretion, or that an irregularity such as this could have prejudicially influenced the jury or caused them any bias in their deliberations."

IX. What the Jury May Take With Them on Retiring.

At common law the jury were permitted to take with them to the jury-room only papers under seal; in this country this rule was recognized as late as 1849,[200] but has long since been abrogated. In many of the States what the jury may take with them on retirement is a matter of practice wholly unregulated by statute. In several it is provided by law that:

> "Upon retiring for deliberation the jury may take with them all papers (except depositions) which have been received in evidence in the cause, or copies of such public records or private documents given in evidence as ought not in the opinion of the

[197] United States v. Davis, 103 Fed. Rep. 457 (1900).

[198] Thomas v. State, 90 Ga. 437 (1892).

[199] 45 La. An. 903 (1893). *Accord:* Batterson v. State, 63 Ind. 531 (1878); Commonwealth v. Tucker, 189 Mass. 457 (1905).

[200] Findlay v. People, 1 Mich. 234 (1849).

> court to be taken from the person having them in possession. They may also take with them the written instructions given, and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person."[201]

In Kentucky[202] "Upon retiring for deliberation, the jury may take with them all papers and other things which have been received as evidence in the cause." In New York[203] "the court may permit the jury upon retiring for deliberation to take with them any paper or article which has been received as evidence in the cause, but only upon the consent of the defendant and counsel for the people."

It is very generally the rule that "papers received in evidence" may be taken out by the jury. By statute in a number of jurisdictions, depositions are expressly excepted from the rule,[204] and in the absence of any definite statutory provision on the subject, the courts tend to exclude them. Depositions partake of the nature of oral testimony which the jurors are to take away with them "on the tablets of their memory,"[205] unless perhaps the court has given permission for the taking of notes. If depositions were permitted to be taken out by the jury, undue weight might be given to them in comparison with other oral testimony. In *Jack* v. *Territory*[206] the court said on this point:

> "The introduction of a deposition into the jury-room which is justly condemned by all the authorities would generally put before the jury a mixture of competent and incompetent matters, between which they could not well discriminate; and would give to one human utterance merely because it chanced to be written down an undue prominence and effect over other equally or more important or reliable human utterances which happened to be oral."

---

[201] For example: California, Penal Code, 1909, §1137; Nevada, Revised Laws, 1912, §7206; Oregon, Lord's Laws, 1910, §143; Montana, Revised Codes, 1907, §9313.

[202] Criminal Code, Practice, §248.

[203] Code Crim. Proc. (Cook), §425; and see People v. Hughson, 154 N. Y. 153 (1897).

[204] So statutes cited in note 201, *supra*.

[205] Cheek v. State, 35 Ind. 492 (1871).

[206] 2 Wash. Ter. 106 (1882).

Dying declarations have not been excepted from the general rule by statute, but where the question has arisen, it is held error for dying declarations to be taken to the jury-room on the ground that a dying declaration is so nearly a deposition, that all the reasons which have been advanced in support of the view that depositions should not be taken by a jury in their deliberations may well be invoked as reasons why dying declarations should be withheld from them.[207]

It has not been usual to provide by statute that exhibits received in evidence, other than papers, may be taken by the jury. The New York and Kentucky statutes, quoted above, do so provide. But in many states, the courts have permitted exhibits to be taken; so a plan and photographs, a bottle of liquor, a revolver and the bullet taken from the brain of the deceased, clothing worn by the deceased at the time of the homicide, an instrument alleged to have been forged, or ledgers and cash book in an embezzlement case.[208] In *Taylor* v. *Commonwealth*[209] cartridge hulls found at the scene of the homicide were introduced into evidence by the prosecution, and prisoner's Winchester rifle, with shells fired from it, during the trial was introduced by him to show that the plunger struck the shells differently from these introduced by the prosecution. The jury were permitted without objection to take the rifle and shells to their room. The question being whether it was proper for the jurors to take the rifle apart and examine the plunger and ascertain that it had been recently tampered with and fixed so as to explode the cartridge differently from those put in evidence by the prosecution, the court held that there was no impropriety in this conduct.

In Washington the statute by its terms permits only "papers" to be taken by the jury. This has been so construed as to

---

[207] Dunn v. People, 172 Ill. 582 (1898); State v. Moody, 18 Wash. 165 (1897).

[208] State v. Shaw, 73 Vt. 149 (1900); State v. Olson, 95 Minn. 104 (1905); McCoy v. People, 175 Ill. 224 (1898); Bell v. State, 32 Tex. Cr. 436 (1893); Harshaw v. State, 94 Ark. 343 (1910); Commonwealth v. Stanley, 19 Pa. Super. Ct. 59 (1902).

[209] 90 Va. 109 (1893).

permit other exhibits received in evidence to be taken, such as clothing or a bottle of whisky.[210] But in other States, under such a statute, it has been held error to give the jury articles which could not reasonably be included within the term "papers." This was the attitude of the court in *State* v. *Crea,*[211] where it was said that "if the legislature in passing the section in question had intended to permit the jury to take all kinds of exhibits with them to the jury-room when considering of their verdict it would have been an easy matter to have clearly expressed such intentions." We quite agree that a statute permitting only "papers" to be taken cannot logically be construed to mean other exhibits, but suggest that statutes upon this subject should be so framed as to permit not only papers, but also such other exhibits as would be of assistance to the jury in arriving at a verdict, to be taken with them upon retiring for deliberation.

Whether the jury may have a copy of the statutes of the State would seem to depend upon whether in the particular jurisdiction they are judges of the law as well as the facts in criminal cases. In *Mulreed* v. *State*[212] the court said:

> "As the jury are authorized by our fundamental law, in all criminal cases whatever to determine the law as well as the facts, it could hardly be regarded as an available or reversible error, if any error at all, for the trial court to permit the jury, in any criminal cause, to read in their retirement the statute defining the offense for which the defendant is prosecuted in such case."

The opposite view is represented by *State* v. *Kimball,*[213] where the court held:

> "It is the duty of the judge to give the principles of law which he regards as applicable to the facts as the jury may find them. And, if he omit to do this, so far as the parties may deem important in view of the evidence, further instructions may be demanded with propriety. But a party has not the right to

---

[210] Jack v. Territory, 2 Wash. Ter. 101 (1882); State v. Cushing, 14 Wash. 527 (1896); State v. Webster, 21 Wash. 63 (1899).

[211] 10 Ida. 88 (1904); see also Hansing v. Territory, 4 Okla. 443 (1896).

[212] 13 Ind. 62 (1886); see also Gandolfo v. State, 11 Ohio St. 114 (1860), and Edwards v. Territory, 1 Wash. Ter. 195 (1862).

[213] 50 Me. 409 (1861); see also State v. Patterson, 45 Vt. 308 (1873).

require the judge to furnish the statutes for the jury, and allow them therefrom to ascertain the law, and judge of its applicability to the facts presented."

It was held in Florida in 1849 that the charge of the court could not be sent to the jury, as this would be tantamount to recharging the jury at their room in the absence of the prisoner and his counsel;[214] but even there that rule has since been changed;[215] and indeed, it is quite generally held that the court may permit the jury to take the written instructions.[216]

Permitting the jury to take papers or other exhibits or the charge of the court, or withholding them from the jury is usually said to be within the sound discretion of the trial court, and the appellate court will grant a new trial only where there has been an abuse of discretion.[217] In Tennessee, however, a statute provides that the charge shall be written, and "the jury shall take it out with them upon their retirement." Under such a statute, the court, of course, has no discretion, and it is error for it to fail to require the charge to be taken.[218]

We have found the usual rule to be that the court may permit "papers or other exhibits received in evidence" to go to the jury. It seems that the defendant by consent or by a failure to object may enlarge this rule. In *People* v. *Mahoney*,[219] the jury having requested that a coat alleged to have been worn by the deceased at the time of the killing be sent to the jury room for their inspection, defendant's counsel stated that the coat had not formally been offered in evidence, and the court said that under the circumstances, the jury would have to do without it; counsel for defendant thereupon in open court consented that

[214] Holton v. State, 2 Fla. 476 (1849).

[215] Dixon v. State, 13 Fla. 636 (1870); Coleman v. State, 17 Fla. 206 (1879).

[216] Green v. State, 143 Ala. 2 (1904); State v. Tompkins, 71 Mo. 613 (1880); Benton v. State, 30 Ark. 328 (1875).

[217] Benton v. State, 30 Ark. 328 (1875); State v. Webster, 21 Wash. 63 (1899); State v. Gillick, 10 Ia. 97 (1859); State v. Butterfield, 75 Mo. 297 (1882); Cook v. State, 231 Ill. 9 (1907); People v. Cochran, 61 Cal. 548 (1882). *Cf.* State v. Raymond, 53 N. J. L. 260 (1891).

[218] Duncan v. State, 7 Baxt. 387 (Tenn. 1874); see also State v. Thompson, 83 Mo. 257 (1884).

[219] 77 Cal. 529 (1888).

the coat be submitted to the jury. It was held that this consent was a waiver of all objection. It has also been held that a failure to object to the jury's receiving something not within the usual rule amounts to a waiver of the right to object thereto.[220]

A question that frequently arises is this: If the jury without permission of the court secure possession of the charge, of an exhibit received in evidence, or of something not received in evidence, what shall be the effect of such misconduct? If it clearly appear that the defendant was not prejudiced, it is quite generally held that the verdict will not be disturbed.[221] There is a difference of opinion in cases where the absence of prejudice does not clearly appear. In some jurisdictions, it is held that the burden is upon the prosecution to show that the defendant was not prejudiced. In *Ogden* v. *United States*[222] the indictments were handed to the jury by an officer of the court and taken into the jury-room with other papers for their consideration; on the back of each was the indorsement of the finding of the jury in the former trial, as set out in the record, that the defendant was guilty; this was alleged as ground for a new trial. The court held:

> "We do not think it necessary for the defendant to show that such indorsements had been read by the jurors or any of them. The presumption that their presence in the jury-room, under the circumstances, was injurious to the defendant, remains until rebutted on the part of the plaintiff."

The other view is that a new trial will not be granted unless the defendant shows affirmatively that he was prejudiced by the conduct of the jury. So in *State* v. *Harris*,[223] the court held that when the jury retired to deliberate, and improperly took out with them a paper, there was no ground for a new trial, unless it

---

[220] Howard v. People, 27 Col. 396 (1900); State v. Taylor, 36 Kan. 329 (1887).

[221] People v. Gaffney, 14 Abb. Prac. N. S. 36 (N. Y. 1872); Lovett v. State, 60 Ga. 257 (1878); State v. Wilson, 40 La. An. 751 (1888); Commonwealth v. Nash, 135 Mass. 541 (1883); Hendricks v. State, 28 Tex. Cr. 416 (1890).

[222] 112 Fed. Rep. 522 (1902); see also State v. Lantz, 23 Kan. 728 (1880).

[223] 34 La. An. 118 (1882). *Accord:* Spencer v. State, 34 Tex. Cr. 238 (1895). And see People v. Priori, 164 N. Y. 459 (1900).

appeared that the paper was examined and that the accused was prejudiced thereby. It is believed that the burden should be upon the defendant to show prejudice in such cases.

X. Separation and Misconduct of Jury.

At common law in the trial of felonies, the jury were not permitted to separate from the time they were sworn until a verdict was rendered; in the trial of misdemeanors, the court in its discretion might permit the jury to separate at any time before verdict. Jurors were then more ignorant, subject to the control of their superiors, and easily led astray. They had but faint notions of popular rights and submitted to restrictions that would not now be tolerated. Trials were brief, seldom occupying an entire day. In *Stephens* v. *People*[224] the court said:

> "The case under consideration occupied seventeen days. To deprive jurors of all association with their families, to seclude them from society, to interrupt their attention to their ordinary affairs, and to deprive them of the opportunity to take such exercise as may be, and often is necessary for the preservation of their health, for so long a period is intolerably oppressive, and can be justified only by absolute necessity. The men of extensive business will not, the infirm cannot submit to the confinement. The consequences are that if the ancient rules forbidding the separation of jurors during a trial should be enforced, at the present day, the public would lose the services of the most reliable jurors and a weary burden would fall exclusively upon those who are unable to pay their fines, and to whom and whose families the entire loss of time is a serious evil."

So with changing conditions there has been a relaxation of the old rule and even in England it has been abrogated to the extent indicated by an Act of 1897:[225]

> "Upon the trial of any person for a felony other than murder, treason, or treason felony, the court may, if it see fit, at any time before the jury consider their verdict, permit the jury to separate, in the same way as the jury upon the trial of any person for misdemeanor are now permitted to separate."

---

[224] 19 N. Y. 549 (1859).

[225] 60 & 61 Vict., Chap. 18.

In this country the courts formerly applied the common law rule very strictly, sometimes because required to do so by statute. A separation was permitted in the trial of misdemeanors at any time before verdict,[226] but no separation was allowed during the trial in felony cases,[227] especially during the trial of capital felonies.[228] The present statutory rule in West Virginia appears to be that the jury are not permitted to separate in felony cases from the time they are sworn until they agree upon a verdict or are discharged by the court,[229] and in several States no separation is permitted in capital cases, though in the trial of felonies not capital the court may permit the jury to separate at any time before they enter upon their deliberations.[230] In the cases it has been pointed out that where separation is not permissible the fact that the defendant consented to it is entirely immaterial; it has been said that the defendant was not in a situation to exercise a fair choice, for he must run the risk of improper influences reaching the minds of the jurors, if he consents, or of prejudicing them against him if he refuses.[231] *Pfeiffer* v. *Commonwealth* [232] justifies the common law rule as follows:

> "It is not too much to say that if it were abolished few influential culprits would be convicted and that few friendless ones, pursued by powerful prosecutors, would escape conviction. Jurors are as open to prejudice from persuasion as other men, and neither convenience nor economy ought to be consulted in order to guard them against it. Let them have every comfort compatible with their duties, but let them not be exposed to the influence of those who might pervert their judgment."

---

[226] Kruger v. State, 1 Neb. 465 (1866); Prewitt v. State, 65 Miss. 437 (1888).

[227] Wiley v. State, 1 Swan, 256 (Tenn. 1851); Cantwell v. State, 18 Ohio St. 477 (1869).

[228] State v. Bonwell *et al.*, 2 Har. 529 (Del. 1811); Woods v. State, 43 Miss. 364 (1871); People v. Shaver, 1 Utah, 260 (1875).

[229] West Virginia, Code of 1906, §4571.

[230] *E. g.* Idaho, Revised Codes, 1908, Vol. II, §7880; Kentucky, Crim. Code, §244; Missouri, Ann. Stats., 1906, §2628 (but in Missouri in cases not capital, the separation may be permitted only with the consent of the prosecuting attorney and the defendant).

[231] People v. Shaffer, 1 Utah, 260 (1875); Peiffer v. Commonwealth, 15 Pa. 468 (1850).

[232] 15 Pa. 468 (1850).

It is suggested that these reasons be compared with those just quoted from *Stephens* v. *People,* in determining whether or not it is advisable to permit the jury to separate during trial.

The tendency of modern decisions and statutes has been toward a relaxation of the old rule, and now in many jurisdictions the court may permit the jury to separate at any time during the trial and before final submission of the cause to the jury, both in the trial of felonies not capital,[233] and in the trial of capital felonies,[234] especially where no objection is made to the separation.[235] As the whole matter is one within the discretion of the trial court, it is not error for the court to direct that the jurors be kept together, and the exercise of this discretion will not be reviewed on appeal, unless it has clearly been abused.[236] Where there are statutes on this subject, it is usual to provide that the court may permit a separation during trial without distinction as to the grade of the offense.[237] So Section 1121 of the California Penal Code provides:

> "The jurors sworn to try an action may, at any time before the submission of the cause to the jury, in the discretion of the court be permitted to separate, or be kept in charge of a proper officer. The officer must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, and to return them into court at the next meeting thereof."

It is quite usual to require an oath of the officer in charge of the jury, when they are not permitted to separate, such as is provided for by the section of the California code just noted. It has been held that if the jury be kept in the custody of an in-

---

[233] People v. Chaves, 122 Cal. 134 (1898); Daxenbeklar v. People, 93 Ill. Ap. 553 (1900); Territory v. Chenowith, 3 N. M. 225 (1885); Robbins v. State, 49 Ala. 394 (1873).

[234] Bergin v. State, 31 Ohio St. 111 (1876); State v. Shaffer, 23 Ore. 555 (1893); State v. Nelson, 91 Minn. 143 (1903).

[235] State v. Andre, 14 S. D. 215 (1900); Armstrong v. State, 2 Okla. Cr. 567 (1909).

[236] Commonwealth v. Lemon, 44 Pa. Super. Ct. 538 (1910).

[237] *E. g.* Cal. Penal Code, 1909, §1121; New York Code, Criminal Procedure, §414; Michigan, Howell's Stats., 1913, Vol. 5, §15131; Montana, Revised Codes, 1907, §9300; Nevada, Revised Codes, 1912, §7190.

dividual who is neither a sworn officer of the court, nor a person specially sworn to discharge this duty, a new trial must be granted.[238] This does not got too far, as it is but reasonable to require that the care of a jury be entrusted only to one who has taken an oath to do his duty in general or to attend to this particular duty. But it has also been held that even though the jury be kept in charge of a sworn officer of the court, as a deputy sheriff, yet a failure to administer the special oath of the statute is error.[239] A better rule, and one upheld by some of the courts, is that while it is advisable to administer to the officer in charge of the jury a special oath to discharge his duty, yet a failure to do so is not error, where he is a sworn officer of the court.[240] Under statutes providing that the special oath *must* be administered, the courts are not perhaps free so to hold; a statute expressly providing that the special oath *should* be administered, but that its omission would not be error where a sworn officer of the court has been entrusted with the jury, would be a complete solution of this question.

In many States, by statute, the jury must, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves, or with anyone else on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them.[241] It has been held error for the court to fail to give the statutory admonition.[242] but it has also been held that when it has once been given, the failure to give the admonition during a subsequent short recess of the court was immaterial error,[243] and

---

[238] McCann v. State, 9 S. & M. 465 (Miss.).

[239] Sutherland v. State, 76 Ark. 487 (1905); Gibbons v. People, 23 Ill. 518 (1860).

[240] Wilhelm v. People, 72 Ill. 468 (1874); State v. Grafton, 89 Ia. 109 (1893).

[241] *E. g.* Cal. Penal Code, 1909, §1122; Idaho, Revised Codes, 1908, Vol. 2, §7881; Indiana, Ann. Stats., 1908, §2139; Iowa, Code, 1897, §5383; Kansas, General Stats., 1905, §6126; New York Code, Criminal Procedure, 1913, §415.

[242] Johnson v. State, 66 Ark. 401 (1900); People v. Thompson, 84 Cal. 606 (1890).

[243] State v. Stackhouse, 24 Kan. 445 (1880).

that the failure of the defendant to object to its omission was a waiver.[244] In the absence of a statute requiring it, the failure of the court to admonish the jury at an adjournment is not error.[245] It is believed that the admonition, like the special oath above discussed, should be given, but that a failure to do so should not be ground for a new trial. Where the record is silent upon this subject, it has been held both that the admonition would be presumed to have been given,[246] and that it would not.[247] A statute providing that a failure to admonish the jury would not be ground for reversal, would render impossible any such difference of opinion; if an entire failure to admonish the jury were not ground for reversal, the mere silence of the record upon the question could not be.

We have pointed out that at common law the jury were not permitted to separate in the trial of felonies, from the time they were sworn until verdict or discharge of the jury. We have also noted the rather general relaxation of the rule in favor of permitting the court to allow a separation during the trial, and at any time before the final submission of the cause to the jury. There has been no such relaxation in regard to separation of the jury after the cause has been finally submitted to them. To be sure, in Arkansas,[248] after the cause is submitted to the jury, they must be kept together in charge of the sheriff, except during their meals and periods for sleep, "unless permitted to separate by order of the court," and in Wyoming[249] when the case is submitted to the jury and they retire for deliberation, they are required to be kept under the charge of an officer, "subject to the discretion of the court to permit them to separate temporarily at night and at their meals." But these statutes are exceptional. The general rule may be said to be that the court may *not* per-

---

[244] Lee v. State, 78 Ark. 77 (1906).

[245] Pritchett v. State, 92 Ga. 65 (1893).

[246] Evans v. State, 7 Port. 271 (Ind. 1855).

[247] People v. Maughs, 149 Cal. 253 (1906); *cf.* People v. Ye Foo, 4 Cal. Ap. 730 (1907).

[248] Digest of Stats., §2373.

[249] Comp. Stats., 1900, §4501.

mit the jury to separate after final submission of the cause,[250] and the error is no less because the defendant consented to the separation.[251]

Upon this subject the California Penal Code provides:[252]

> "After hearing the charge, the jury may either decide in court, or may retire for deliberation, if they do not agree without retiring, an officer must be sworn to keep them together in some private and convenient place, and not to permit any person to speak or to communicate with them, nor to do so himself, unless by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court, when they have so agreed, or when ordered by the court."

The usual statutory rule is exactly like, or very similar to, the section quoted. As to the oath administered to the officer, practically the same considerations apply that were suggested in connection with the special oath administered to the officer in charge of the jury when kept together during the trial. It has been held error for the jury to be entrusted during their deliberations to the care of an unsworn person.[253] It has also been held error for the court to fail to cause the special oath to be administered,[254] but the weight of authority is to the effect that if the jury be given over to the care of a sworn officer of the court, the failure to administer the special oath is not error.[255] This is as it should be. To bring about this result in some jurisdictions it would be necessary, because of existing decisions, to provide ex-

---

[250] Parker v. State, 18 Ohio St. 88 (1868); Chance v. State, 5 Okla. Cr. 194 (1911); People v. Hawley, 111 Cal. 78 (1896). *Cf.* State v. McNeil, 59 Kan. 599 (1898).

[251] Parker v. State, 18 Ohio St. 88 (1868); People v. Hawley, 111 Cal. 78 (1896).

[252] §1128. See Idaho, Rev. Codes, 1908, Vol. 2, §7887; Arizona, Rev. Stats., 1901, §956; Utah, Comp. Stats., §4877; South Dakota, Comp. Laws, 1908, Vol. 2, Code Cr. Pro., §386; North Dakota, Revised Codes, 1905, §10027; New York, Code Criminal Pro., 1913, §421; and similar statutes in other states.

[253] Roberts v. State, 72 Ga. 673 (1884); Hare v. State, 4 How. 187 (Miss. 1839).

[254] Lewis v. State, 44 Ill. 452 (1867); State v. McCormick, 57 Kan. 440 (1896).

[255] State v. Crafton, 89 Ia. 109 (1893); Clayton v. State, 100 Ind. 201 (1884); Cato v. State, 9 Fla. 163 (1860); Davis v. State, 15 Ohio, 72 (1846).

pressly that the failure to administer the special oath should not be error under the circumstances mentioned.

As the court has in many States the power to permit the jury to separate during trial, but has no authority to permit a separation after final submission of the cause to the jury, it becomes necessary to know when the cause may be said to be finally submitted. Here we encounter a difference of opinion. In *State* v. *Parrant,*[256] after the charge, the court gave the jury a recess of five minutes, and they were allowed to go at large for that period of time. Upon their return the sheriff was sworn to take charge of them, and they retired under his charge. The court held that the plain meaning of the statute was that, after hearing the charge, the jury must, at once, do one of two things specified: agree in court or retire for deliberation. All separation after the charge was given was contrary to the statute. On the other hand, in *State* v. *Ferrell,*[257] after the charge was given, the jury were permitted to separate for the noon meal. Upon their return immediately thereafter, the court's charge and blank verdicts were given them, and they then retired for deliberation. It was held that a cause is finally submitted to the jury within the meaning of the statute at such time as the court directs the jury to enter upon its deliberations and not necessarily at the conclusion of the charge of the court to the jury; this cause was finally submitted at the hour of reassembling, not at the time of separation. The latter view seems to be the more logical.

It is generally held that the separation of a juror from the rest of the jury, in proper custody, and for a necessary and proper purpose, is not ground for a new trial, whether such separation happen during the trial,[258] or after the jury have entered upon their deliberations.[259] Indeed, in Texas,[260] in felony cases, this is the only kind of separation that is permitted, a statute

[256] 16 Minn. 178 (1870).

[257] 69 Ohio St. 521 (1903).

[258] Moss v. Commonwealth, 107 Pa. 267 (1884); State v. Dyer, 139 Mo. 199 (1897); Kee v. State, 28 Ark. 155 (1873); Neal v. State, 64 Ga. 272 (1879).

[259] Cooper v. State, 120 Ind. 377 (1889); State v. Adams, 20 Kan. 311 (1878); State v. Bowman, 45 Ia. 418 (1877).

[260] Crim. Stats., 1911, §7454. See McCampbell v. State, 37 Tex. Cr. 607 (1897).

providing that after the jury has been sworn and impanelled to try any case of felony, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorney representing the State and the defendant, and in charge of an officer.

Misconduct of the jury or of other persons toward them may or may not, according to the circumstances, be ground for a new trial. The judge may be guilty of misconduct in improperly communicating with the jury, or in coercing them to a verdict. In *State* v. *Kiefer*[261] while the jury were deliberating, a written communication was sent to the court, signed by the foreman, asking if the jury might recommend the defendant to the mercy of the court. The judge indorsed upon the paper the answer: "Yes, and I have made it an invariable rule to follow such recommendations." A new trial was granted, the court pointing out that "the jurors might very naturally conclude from the language used, that they could rely upon the court to extend clemency to the accused in case he should be convicted, and it might have the effect to induce the jurors to disregard any reasonable doubts that they might have as to the guilt of the accused." Coercion of the jury by the court, regarded as ground for a new trial, may be illustrated by the following cases. In *State* v. *Place,*[262] after the jury had been out all night without having agreed, they were brought into court and asked if they had agreed; they said not, that they were "shy on evidence". The court then said: "But you will have to agree to this case, for I will keep you together until you do agree." This was held error. In *People* v. *Sheldon,*[263] a capital case, the trial had lasted seven weeks, and a verdict of guilty was rendered after the jury had been kept together for about eighty-five hours without beds or cots, and from the remarks of the court they had reason to believe that they would be still longer confined unless they agreed; the court in refusing to discharge the jury on their reporting their failure to agree had said: "I cannot hear of a

[261] 16 S. D. 180 (1902); see also Hoberg v. State, 3 Minn. 262 (1859).
[262] 20 S. D. 489 (1906).
[263] 156 N. Y. 268 (1898); and see State v. Chambers, 9 Ida. 673 (1904).

disagreement of this jury; I would like to enforce upon you an appreciation of the importance of settling this question—it has got to be settled." The court held that the agreement of the jury must be regarded as coerced, and as calling for a new trial.

The court may, however, impress upon the jury the importance of their arriving at an agreement if they honestly can do so. In *Odette* v. *State*,[264] after the jury had been out some time and failed to agree, they were brought into court and told by the judge that "they ought not to stand out in an unruly and obstinate way, but should reason together and talk over the existing differences, if any, and harmonize the same if possible; that it was their duty to meet the testimony in a spirit of fairness and candor with each other and not to stand back obstinately, but to reason together and apply the law as given by the court to the facts of the case, and arrive at some kind of a verdict." The court held that this could not be construed as a threat that the jury would not be discharged until they had agreed, and the judgment was affirmed. Again, when a jury has difficulty in arriving at a verdict, the time that it may be kept together is largely a matter within the discretion of the court, and is not of itself any evidence of coercion, unless the time is clearly unreasonable.[265]

Coercion of the jury or improper communications to them on the part of the officer in charge may be ground for a new trial. It has been held error for the officer to warn the jury that they would be locked up for the night unless they agreed very soon, or to read part of the instructions to the jury at their request, or to tell them to hurry up and agree upon a verdict, as he was growing tired of being shut up with them,[266] but if a

[264] 90 Wis. 258 (1895). *Accord:* Secor v. State, 118 Wis. 671 (1903). *Contra:* State v. Ivanhoe, 35 Ore. 150 (1899). See also Territory v. McGinnis, 10 N. M. 269 (1900); State v. Finch, 71 Kan. 793 (1905); U. S. v. Ingham, 97 Fed. Rep. 935 (1899).

[265] Gilbert v. Commonwealth, 21 Ky. L. Rep. 415 (1899); Russel v. State, 66 Neb. 497 (1902); People v. Stock, 1 Ida. 218 (1868); State v. Rose, 142 Mo. 418 (1897).

[266] Brown v. State, 127 Wis. 193 (1906); State v. Brown, 22 Kan. 222 (1879); Brown v. State, 69 Miss. 398 (1891). See also Coolman v. State, 163 Ind. 503 (1904); State v. Dallas, 35 La. An. 899 (1883); Shaw v. State, 79 Miss. 577 (1901).

communication be shown not to have been of a character likely to cause prejudice, a new trial will be refused.[267] The courts do not agree as to whether the mere presence of the officer in the jury room while they are deliberating upon their verdict is error. It has been held that if the officer is a proper person to take charge of a jury, it is not error that he was in the jury room during the deliberations,[268] and on the other hand that his presence is error, because "whether he does or does not converse with them, his presence to some extent must operate as a restraint upon their proper freedom of action and expression."[269]

It is impossible to attempt to discuss within the limits of this article all the forms of misconduct of which jurors have been guilty, and the effect which has been given to such misconduct by the courts. A few, however, will be suggested as illustrative of general principles on the subject. A new trial will invariably be granted where the verdict has been arrived at by lot,[270] as where the jury have been unable to agree upon the term of imprisonment, and, under an agreement to abide by the result, have set down the number of years which each favored, added the numbers so obtained, and divided the result by twelve.[271] It has been held error for the jury to obtain and read, either during the trial or after retirement to deliberate upon the verdict, newspapers containing imperfect or incorrect accounts of the trial or comments calculated to prejudice the defendant.[272] Conversation of a juror with a third person has

[267] State v. Barker, 43 Kan. 262 (1890); State v. Robertson, 50 La. An. 455 (1898); McFalls v. State, 66 Ark. 16 (1898); Alexander v. State, 22 So. Rep. 871 (Miss. 1898).

[268] Crockett v. State, 52 Wis. 211 (1881); Martin v. State, 9 Tex. Ap. 293 (1880); and see State v. Thompson, 54 N. W. Rep. 1077 (Ia. 1893); Gaines v. People, 97 Ill. 270 (1881).

[269] People v. Knapp, 42 Mich. 267 (1879); Gandy v. State, 24 Neb. 716 (1888); and see Longley v. Commonwealth, 99 Va. 807 (1900).

[270] See *e. g.* California, Penal Code, §1181-3; Idaho, Revised Codes, 1908, Vol. 2, §7952-3; Ia. Code, 1897, §5424-4; Montana, Rev. Codes, 1907, §9350-4; New York. Code Cr. Pro., §433-4.

[271] Driver v. State, 37 Tex. Cr. 160 (1897); Williams v. State, 15 Lea, 129 (Tenn. 1885). *Cf.* Glidewell v. State, 15 Lea, 133 (Tenn. 1885).

[272] Walker v. State, 37 Tex. 366 (1872); Cartwright v. State, 71 Miss. 92 (1893); State v. Walton, 92 Ia. 455 (1894). But *cf.* State v. Jackson, 9 Mont. 508 (1890); State v. Williams, 96 Minn. 351 (1905); McCue v. Commonwealth, 103 Va. 871 (1905).

been held ground for a new trial, but by the weight of authority, a new trial will not be granted if it be shown that such conversation did not concern the case or for some other reason was not prejudicial to the accused.[273] In *Hutchins* v. *State*,[274] after the jury had retired, and one had been selected foreman, he refused to allow any juryman to express an opinion or say anything of the law or the evidence in the case, unless the juror so desiring to express his opinion should first arise and address the foreman as chairman, and be recognized by the chairman. The court held this error, as men on the jury of the soundest judgment and good sense, but unfamiliar with the rules of debate, and unaccustomed to rise and address the chairman of a meeting in a formal manner, might be intimidated by such a rule as was here enforced.

A common form of misconduct among jurors has been the drinking of intoxicating liquor during the trial or while the jury deliberate upon the verdict. If intoxication results, there is no question but that a new trial will be granted.[275] Where intoxication does not result, there are different views in the States, as to the effect of the misconduct. It has been held that the drinking of intoxicating liquor, at any rate while the jury are deliberating upon their verdict, is of itself error, without any inquiry at all into the question whether the defendant was prejudiced thereby.[276] So in *State* v. *Baldy*[277] the court said:

> "The parties have a clear right to the cool, dispassionate and unbiased judgment of each juror applied to the determination of the issues in the cause, and the use in any degree of that which stimulates the passions and has a tendency to lessen the soundness of judgment is itself conclusive evidence that the party who has the right to the exercise of that dispassionate

---

[273] State v. Cotts, 49 W. Va. 615 (1901); Riley v. State, 9 Humph. 646 (Tenn. 1849); Suple v. State, 133 Ga. 601 (1909); State v. Harris, 12 Nev. 414 (1877); State v. High, 116 La. An. 79 (1906); State v. Craig, 78 Ia. 641 (1889).

[274] 140 Ind. 78 (1894).

[275] Brown v. State, 137 Ind. 240 (1893); People v. Gray, 61 Cal. 164 (1882).

[276] State v. Bullard, 16 N. H. 139 (1844); People v. Chuck, 78 Cal. 317 (1889), but *cf.* People v. Bemmerly, cited note 81, *infra;* and see State v. Strodemeir, 41 Wash. 159 (1905); People v. Myers, 70 Cal. 582 (1886).

[277] 17 Ia. 39 (1864).

judgment, has been prejudiced in not having it as perfect as it existed in the juror when accepted, applied to the determination of the cause."

The tendency, however, is to determine the effect to be given to drinking by the jurors upon a basis of prejudice to the defendant. If it is shown that the defendant was not prejudiced, a new trial will be refused.[278] If the absence of prejudice is not shown, there is the difference of opinion that we have already noted in other connections. It is held on the one hand that the misconduct of the jury raises a presumption that the prisoner was injured thereby, which the State must remove beyond a reasonable doubt,[279] and on the other that the burden is upon the defendant to show that he was prejudiced, and that the verdict was affected by the misconduct alleged.[280]

We have pointed out that in general the court may permit the jury to separate at any time before the cause is finally submitted to them, and that no separation may be permitted after final submission of the cause. We now inquire: If during the trial, the court has required the jury to be kept together, and they have separated without authority, or if they have separated after the cause has been submitted to them, what effect is to be given to their misconduct in this particular? In some of the cases, a new trial has been refused when asked, because there had been in fact no separation at all. In *State* v. *White*,[281] during a recess of the court, a juryman left the jury box, walked across the courtroom and took a drink of water from a bucket in another part of the room. The officer in charge of the jury testified that the juryman was not out of his sight. A new trial was held to have been properly refused under these circumstances. In *Minor* v. *Commonwealth*[282] the jury were lodged

[278] Gamble v. State, 44 Fla. 429 (1902); State v. Madigan, 59 N. W. Rep. 490 (Minn. 1894); Jones v. State, 6 Col. 452 (1882); State v. Reilly, 108 Ia. 635 (1899).

[279] State v. Greer, 22 W. Va. 800 (1883).

[280] People v. Bemmerly, 98 Cal. 299 (1893); State v. Bruce, 48 Ia. 530 (1878); State v. Olberman, 33 Ore. 556 (1899); State v. Tatlow, 34 Kan. 80 (1885); Allen v. State, 17 Tex. Cr. 637 (1885).

[281] 52 La. An. 206 (1899).

[282] 5 Ky. L. Rep. 176 (1883). *Accord:* Commonwealth v. Manfredi, 162 Pa. 144 (1894).

on the second floor of a hotel in different rooms along the same hall, in which the sheriff locked them at night. This was held a sufficient compliance with the statute requiring them to be kept together.

Where there has been an unauthorized separation, we find the rules applied not different from those suggested in connection with jurors indulging in intoxicating liquors. Where it is reasonably certain that the defendant was not prejudiced by the separation, a new trial will be refused.[283] For example, in *Commonwealth* v. *McCauley*,[284] after the jury had agreed upon a verdict, and were returning to the courtroom, a juror, without the knowledge of anyone, separated from his fellows and left the courthouse to go to dinner. When his absence was discovered the presiding justice instructed the officer in charge of the jury to keep the other jurors together in the courtroom and to seek the missing juror and bring him back. This having been done, a verdict of guilty was rendered in the usual manner. The presiding justice afterwards talked with the juror and the officer who went in search of him and was satisfied that the juror, during his absence, had not conversed with anyone in regard to the case, and found that the separation did not prejudice the defendant. The court, on motion to set aside the verdict, held that the facts were not, as matter of law, inconsistent with the finding of the presiding justice, and the defendant's exceptions were overruled. If it is not perfectly clear that the prisoner has not sustained any injury from the separation, there is a difference of opinion as to its effect. In some jurisdictions it is held that the defendant is entitled to the benefit of a presumption that the irregularity has been prejudicial to him, and the burden of proof is upon the government to show beyond a reasonable doubt that the prisoner has suffered no injury by reason of the separation.[285] In others, it is held that the burden is upon the defend-

[283] State v. Harlow, 21 Mo. 446 (1855); Thompson v. Commonwealth, 8 Va. 837 (1851); State v. Church, 6 S. D. 89 (1894); Commonwealth v. Williams, 209 Pa. 529 (1904); State v. O'Brien, 7 R. I. 336 (1862); Territory v. Hart, 7 Mont. 489 (1888).

[284] 156 Mass. 49 (1892).

[285] During trial: State v. Prescott, 7 N. H. 287 (1834); Keenan v. State,

ant to show that he has been prejudiced, and in the absence of such a showing, a new trial will not be granted.[286] The adoption by legislation of a rule that no new trial should be granted because of misconduct of the jury or of other persons toward them, unless the accused show affirmatively that he was prejudiced, would prevent the reversal of many cases in jurisdictions where new trials are now granted because of the rule that error is presumed, and the burden is upon the State to remove the presumption.

Only a few phases of trial procedure have been considered in the course of this discussion; the writer has endeavored, however, to show that the examination of existing rules in regard to almost any aspect of the subject will show the need of remedial legislation. The adoption by the several States of a criminal code, which will prevent the escape of a guilty defendant because of technicalities or irregularities not shown to be prejudicial to him, yet will give complete justice to all who are brought to trial on criminal charges, is greatly to be desired.

Howard A. Lehman.

Law School, University of Pennsylvania.

---

8 Wis. 132 (1859); Thacker v. Commonwealth, 23 Ky. L. Rep. 745 (1901); State v. Harrison, 36 W. Va. 729 (1892).

During deliberations: People v. Adams, 143 Cal. 208 (1904); Boles v. State, 13 S. & M. 398 (Miss. 1850); Weis v. State, 22 Ohio St. 486 (1872).

The state may of course remove the presumption by proof: State v. Clark, 51 W. Va. 457 (1902); People v. Cord, 157 Cal. 562 (1910).

[286] Adams v. People, 47 Ill. 376; State v. Wart, 51 Ia. 587 (1879); State v. Olds, 106 Ia. 110 (1898); Cox v. State, 7 Tex. Ap. 1 (1879); State v. Dougherty, 55 Mo. 69 (1874); Stout v. State, 76 Md. 317 (1892); Shivers v. Ter., 13 Okla. 466 (1903).